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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re:)	
)	
IAN GREGORY THOW,)	No. 05-30432
)	
Debtor.)	
)	

TRANSCRIPT OF THE DIGITALLY-RECORDED PROCEEDINGS
BEFORE THE HONORABLE PHILIP H. BRANDT
NOVEMBER 8, 2007

Reported by: Robyn Oleson Fiedler
CSR #1931

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A P P E A R A N C E S

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1 DIGITALLY RECORDED IN SEATTLE, WASHINGTON

2 NOVEMBER 8, 2007

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5 THE COURT: So the Thow matter. Well, I will
6 start by noting the presence of Mr. Allred representing
7 various Canadian media, Mr. Leaverton representing the
8 Canadian trustee, Ms. Riley and Mr. Feinstein
9 representing the debtor, and I understand Mr. Cheevers
10 and Mr. McLean are on the telephone.

11 Let me say a few things to begin with.
12 First, it seems to me that the order -- the request for
13 an order shortening time is moot. I understand this
14 hearing was scheduled with the agreement of all the
15 parties. And so unless there's some -- somebody that
16 disagrees with that, we'll simply strike that motion as
17 moot.

18 With respect to the Global BCTV motion to
19 intervene, which came in, I believe, yesterday, it
20 doesn't seem to me to present any different or
21 additional issues. And my inclination is to treat that
22 simply as a joinder in the previous media motion. If
23 the trustee or the debtor have any different position,
24 let me know now. Otherwise, we'll simply treat it in
25 that fashion.

1 MR. LEAVERTON: I believe that's all right,
2 Your Honor, by the -- unless the trustee speaks up and
3 tells me he has an objection, then I think that's fine.

4 THE COURT: All right. So that motion -- the
5 outcome of that motion will be the same as the outcome
6 of the other motion -- the earlier motion that
7 Mr. Allred filed.

8 So that brings us to the main motion. And
9 I've spent a lot of time in the last two days reading a
10 lot of things, the pleadings and cases and so on. And
11 I haven't really -- I don't think I've reached a
12 tentative ruling. I really do want to hear the
13 argument.

14 I will point out that we have some 10:30
15 matters which are somewhat complicated and have been
16 ongoing things that I'm going to need to finish today.
17 And so that's about the time we have got this morning.
18 I understand there may be some urgency to a ruling in
19 this case, and so I'd like to hear from the parties on
20 that. If necessary, we can reconvene mid afternoon or
21 something, or this afternoon or even tomorrow morning.
22 But I just simply have to wait until I hear some more
23 on -- and we see where we are.

24 It seems to me there are several questions.
25 The first one -- and this one I suspect I know the

1 answer to. Does it make any difference that the moving
2 parties that would be intervenors are Canadian? And it
3 it seems to me that probably doesn't make any
4 difference.

5 The next question is whose rules apply with
6 respect to the 2004 examination? Is this a proceeding
7 in a U.S. bankruptcy court and, therefore, U.S. rules
8 apply? Or is this somehow, because of the operation of
9 Chapter 15 and the Canadian UNCITRAL equivalent, a
10 Canadian proceeding simply transplanted south of the
11 49th parallel? And then there -- that's the Chapter 15
12 kind of issues.

13 There's also the less formal, but significant
14 question of comity, whether or not -- if the U.S. rules
15 apply, nevertheless, what deference should be paid to
16 the Canadian practice, which I understand it is to
17 exclude non-parties from the equivalent of a 2004 exam.

18 Then there's the question, "Is the 2004 exam
19 discovery or a court proceeding?" Section 107 of the
20 Bankruptcy Code, or Rule 5001(b), I think it is, seem
21 to me only applicable to court papers in proceedings
22 and not directly applicable to discovery matters unless
23 they are -- unless transcripts or exhibits are actually
24 filed in court as part of a pleading or perhaps as
25 exhibits in a trial. And that's also true with respect

1 to the civil local rule 5(g)(1), I think it is, of the
2 Western District of Washington.

3 So there are some major questions here. This
4 is first impression on a lot of issues.

5 So with that, Mr. Allred?

6 MR. ALLRED: Thank you, Your Honor. Your
7 Honor, just for the record, so that we have a complete
8 record, I'm appearing here on behalf of CHEK TV, the
9 Times columnists and Global BCTV.

10 THE COURT: And Global BCTV, is it also a
11 Victoria station?

12 MR. ALLRED: No, it's a television station in
13 Vancouver.

14 THE COURT: Okay. So we have Victoria --

15 MR. ALLRED: So you have Victoria press and
16 Vancouver press -- or Victoria media and Vancouver
17 media.

18 THE COURT: Okay. And there's no contention
19 that any of these media outlets are anything other --
20 they're not seeking to intervene on any basis other
21 than media and public interests.

22 MR. ALLRED: That's correct. We're not
23 seeking to intervene to --

24 THE COURT: As far as we know, Mr. Thow paid
25 his paperboy.

1 MR. ALLRED: 2004 exam or anything like that.
2 We are intervening merely for the purposes of being
3 able to listen in any 2004 exams that occur from now on
4 and getting a copy of the transcript of what occurred
5 on the 29th.

6 THE COURT: Which I understand is in the
7 works. I don't know if it's completed or not.

8 MR. ALLRED: I don't know whether it's
9 completed yet or not.

10 Let me just address the issues.

11 THE COURT: Before we get into the issues,
12 what's your view on timing? How urgent is the ruling
13 on this?

14 MR. ALLRED: Well, our view is it is quite
15 urgent. If you've read a lot of these cases, you will
16 find in those cases the statement that, you know,
17 basically, access denied to the press is really a
18 denial on a fundamental nature. And so the fact that
19 it -- you know, this stuff is important to the viewing
20 public and the reading public of my clients. And if it
21 gets stale, then it's no longer of use. And so we need
22 to get this matter resolved as quickly as we can.

23 That doesn't mean we have to have a written
24 ruling from this Court. We need an oral ruling, at
25 least, so we know what's going on. And if the Court

1 likes to write a written ruling, that would be fine,
2 but --

3 THE COURT: But that's likely to take longer.
4 That's part of the reason for the question.

5 MR. ALLRED: Yeah. And like I say --

6 THE COURT: Not likely to, would, in fact,
7 take longer, even on a very expedited basis.

8 MR. ALLRED: Yeah. And so if the Court --
9 you know, we can certainly act on whatever the Court's
10 oral ruling is, and then, obviously, if the Court
11 wishes to put that oral ruling in writing, that would
12 obviously take some time, given the complexity of the
13 issues.

14 I'm just going to address some of these
15 issues that you raised initially, and then -- you
16 indicated that -- whose rules apply to 2004 exams.

17 THE COURT: Oh, let me interrupt. I didn't
18 really address the intervention question itself. And
19 maybe we should -- I'm sorry to interrupt you as you're
20 starting, but maybe we should address that first before
21 we get into the access or not or transcripts or not.

22 I will say that my instinct is that the
23 intervention on the part of the media for the purpose
24 of getting the news out, so to speak, that that's a
25 proper intervention motion. I don't think it makes any

1 difference that the media are Canadian. This is a
2 proceeding that in some sense is happening in the
3 United States courts, and it certainly is happening
4 geographically in the United States.

5 So my inclination is to find that there is
6 good cause for intervention on the part of the media
7 and to grant the intervention motion. But maybe before
8 you go further, I should hear from the opposing parties
9 on that question, and then we'll get to the other
10 question.

11 MR. ALLRED: May I address why we should be
12 allowed to intervene?

13 THE COURT: Sure, just very quickly.

14 MR. ALLRED: Well, first of all, I'd point
15 out in terms of the Canadian issue, just as people in
16 Canada and British Columbia listen to the local
17 channels here, those channels are also broadcast into
18 the United States. And so we have United States
19 citizens listening to those as well.

20 THE COURT: Having grown up near Lynden, I'm
21 quite aware of that. My school bus turned around in
22 Canada, as a matter of fact.

23 MR. ALLRED: I bet you couldn't do that now.
24 So in terms of the intervention, as I read the
25 pleadings, I didn't see an argument against

1 intervention in the pleadings filed by the Foreign
2 Representative. The pleadings filed by the debtor do
3 clearly argue that we ought not to be permitted to
4 intervene. And the applicable rule, as the Court
5 knows, is 2018(a). And the cases on which everyone
6 relies -- in fact, every single case that I read -- and
7 I can't state that I've read every case on the issue
8 that's ever been written, but every case that I read,
9 and that's quite a few -- they permitted intervention,
10 even in the cases where after intervention was
11 permitted, the press was restricted in some kind of
12 way.

13 THE COURT: I don't think that the two
14 rulings necessarily track. I mean, you could very well
15 win on intervention, but not get what you want.

16 MR. ALLRED: Right. And so even the cases
17 relied upon by the debtor, the Ionosphere Clubs case,
18 for example, they allowed them to intervene. So I
19 think that that's an easy question for the Court to
20 answer. I think that the public public interest, which
21 is represented by the media in these proceedings,
22 demands that they be allowed to intervene and be heard
23 in respect to the issues in this case.

24 THE COURT: Let me hear from the other
25 parties on that before we go on to the other issues.

1 Mr. Leaverton?

2 MR. LEAVERTON: Yes. Your Honor, the
3 Canadian trustee does object to the intervention. I
4 think it's not a matter easily disposed of. And the
5 reason for that is I think we've all had a crash course
6 on prior restraint, First Amendment law and access to
7 court issues over the last couple of weeks. I
8 certainly have. And reading the cases that are cited
9 by the news media movants, and considering the cases
10 that we cited in our briefing, I think the common
11 thread here is that the media is routinely granted this
12 intervention right where there are court records,
13 matters of record in the court record available.

14 I think the only case --

15 THE COURT: But this is about whether or not
16 it gets to be here even to make the argument.

17 MR. LEAVERTON: I understand. I understand.
18 And I'm -- on the one hand, I don't think the Canadian
19 trustee objects to having the Court consider these
20 matters. And I think you're going to have to hear
21 argument on these underlying issues to really get at
22 the intervention issue. Because here's the
23 distinction, I think. And I think the only case I saw
24 that may differ with that is the Symington case.
25 Because I think in Symington, if I recall correctly,

1 there were not in-court papers involved that had been
2 gathered together. And there was a media request to
3 get it because the notoriety of Mr. Symington, the
4 former governor.

5 And so I think what the courts have done is
6 when there are matters of record that the Court has
7 sealed or that are the subject of protective orders
8 where the public's right of access is being restrained
9 by an order of the court, a prior restraint, if you
10 will, then there is this presumption and the
11 intervention of the press, I think, right that comes
12 into play.

13 Here you've got kind of a more fundamental
14 question, which is we're not dealing with any order of
15 the court, per se. What we're dealing with is --

16 THE COURT: Well, we're dealing with an exam
17 that's conducted pursuant to an order of the court.

18 MR. LEAVERTON: Right.

19 THE COURT: Not quite like a deposition in
20 that regard.

21 MR. LEAVERTON: Correct. But I think the
22 question is I think the press stands in the same
23 relation as any member of the public who would want to
24 come before Your Honor and intervene and participate in
25 a 2004 exam. And I think on that basis, if they have a

1 presumptive right to intervene, really, so would any
2 other member of the public. Because I think what
3 they're asking for is to get involved in an
4 examination, not to see a record that's been sealed or,
5 you know, a public right of access type issue. And
6 those are -- I think that's what triggers this
7 intervention.

8 THE COURT: Ms. Riley?

9 MS. RILEY: Good morning, Your Honor. I
10 guess first I should ask for the Court's permission to
11 argue this morning. I have not filed a notice of
12 appearance in this case; nor have I asked to associate
13 in. As you know, I do represent --

14 THE COURT: I'm sure that can be rectified.
15 And certainly, go ahead.

16 MS. RILEY: Very well. And obviously, my
17 notice of appearance would be for this matter only at
18 this time.

19 I think Mr. Leaverton --

20 THE COURT: This matter meaning those matters
21 relating to the 2004 exam?

22 MS. RILEY: Exactly, Your Honor, not the
23 bankruptcy that proceeds the 2004.

24 As Mr. Leaverton pointed out, you know, I
25 think there are overreaching issues that we have

1 addressed -- or at least I have addressed in my
2 briefing ad nauseam, and that is the fundamental fact
3 that the 2004 exam does not involve pleadings or
4 hearings that are matters of public record. This is
5 the fact that distinguishes this case from all the
6 cases that are cited by the news media.

7 This is not a typical court proceeding where
8 you have documents that have been filed under seal or
9 where a party has requested a protective order. As
10 Mr. Leaverton pointed out, this is somewhat akin to the
11 public seeking access to such an examination. And I
12 think as we get through the various arguments that are
13 presented before the Court today, more reasons will
14 come up as to why this intervention and request for
15 access is inappropriate.

16 But the fundamental issue here is that this
17 is not a public proceeding. This is a 2004 exam, the
18 purpose of which is to allow the trustee to inquire
19 into the debtor's affairs in a very broad sense. It's
20 somewhat of a legal fishing expedition, as some of the
21 case law points out. And because of the broad nature
22 of that exam, there has to be some level of protection
23 to the information that is gleaned from it.

24 Because these documents are not filed with
25 the Court, they are not a matter of public record.

1 They are very different from the proceedings that are
2 cited by the news media in the precedent that they
3 presented to the Court.

4 I think I'll kind of stop right there and see
5 where the Court wants to go with regard to the other
6 arguments, but I think that's kind of the threshold
7 that the news media needs to break in order to
8 intervene in this matter.

9 Thank you.

10 THE COURT: Thank you.

11 Mr. Allred, a brief response?

12 MR. ALLRED: Yes, Your Honor. I think what
13 both of these arguments do is sort of mesh into one
14 argument, the two arguments. There is a right to
15 intervene. I mean, in a Chapter 15, we're talking
16 about an open proceeding. In these courts, these
17 United States courts, there's a right to intervene.
18 Then whether the intervenor has rights to do things,
19 that's the underlying question that the Court is going
20 to have to decide.

21 It seems to me what both of these arguments
22 do is smush those two things together, so that if you
23 don't have a right to intervene in the underlying
24 matter, you don't have a right to intervene at all.
25 And that simply can't be the law. The law is -- it

1 ought to be and it is -- that an intervenor can
2 intervene, and then if the Court decides that, for
3 whatever reason, the intervenor -- when the intervenor
4 makes a motion or asks for some kind of relief that's
5 not going to be granted, then it's not going to be
6 granted, just like it is to any other party in the
7 case.

8 So it seems to me, again, I'd point out that
9 every single case that's been cited in the pleadings
10 from both sides allow the press to intervene. And so
11 the Court ought not to confuse the right to intervene
12 with the right to the underlying relief that the media
13 is requesting in these matters.

14 THE COURT: Well, for this morning's
15 purposees, I'm not going to rule right now. You've
16 heard my preliminary thoughts. I don't think I've
17 changed on that, but I'm not going to make that as a
18 ruling. But I do want to go ahead and hear the
19 underlying argument as well. I'll rule on both of them
20 at the same time.

21 MR. ALLRED: Well, the Court raised some
22 issues -- before we get into is this an open -- is the
23 2004 exam an open proceeding or not question -- and
24 that is the Court phrased it as whose rule applies in
25 2004 exams. I assume you're talking about evidentiary

1 rules or the rule of whether it is private or not
2 private.

3 THE COURT: I was thinking in terms of
4 between -- there was some suggestion in the briefing
5 that, well, the Canadian closed examination rule ought
6 to apply, either because this is really a transplanted
7 Canadian proceeding or through comity.

8 MR. ALLRED: Right. And it just seems to me
9 that, first of all, Section I think it's 106 disposes
10 of that issue. In terms of the comity issue, at least,
11 it says that you cannot change basic policies of this
12 court in a matter of comity to a foreign court.

13 I think the Court would also find -- and I
14 did not have a chance to research this -- but I think
15 you'll also find that in matters of procedure, either
16 under conflict of law rules, matters of procedure don't
17 get adopted as matters of substantive law.

18 And for example, if under U.S. procedure, a
19 certain matter was admissible under the rules of
20 evidence, but under a Canadian procedure it was not, I
21 don't think the fact that this is a Chapter 15
22 proceeding would require that we throw out the rules of
23 evidence in the United States. I think that assumes
24 way too much.

25 What has happened here is this foreign

1 representative has elected to take advantage of the
2 powers of this Court and has petitioned this Court so
3 that he may examine the debtor, so that he may,
4 presumably, seize assets that belong to the debtor in
5 the United States, so that he can seek any other kinds
6 of remedies that are appropriate. And he has -- as the
7 Court knows, under Chapter 15, those remedies are
8 broad. In fact, the only things he can't do that a
9 trustee can do is with respect to certain avoiding
10 powers and exemption powers. Other than that, he has a
11 full panoply of powers that a trustee under Chapter 7
12 has.

13 And so the foreign representative has both
14 those powers as to assets located here in the United
15 States. And so having invoked those powers, he cannot
16 now say --

17 THE COURT: I understand that some of --
18 there's at least a hint in some of the papers that some
19 of the assets are located in third countries.

20 MR. ALLRED: Well, but --

21 THE COURT: And that the examination is
22 related to that.

23 MR. ALLRED: Yeah. But certainly, he's
24 examining the debtor here in the United States. In
25 respect to assets that may be located in third-party

1 countries, I don't know what that means exactly. But
2 what it does mean is that he has invoked the powers of
3 this Court to force this debtor to come in and give
4 testimony under oath. The record is replete with
5 objections and rulings in respect of his claims of
6 self-incrimination protection under the Fifth Amendment
7 and others.

8 So, you know, this has not been -- this has
9 been a matter in which the Court has been involved on a
10 number of occasions, to the direct benefit of the
11 foreign representative. Because as I understand it,
12 the Court has ruled that this debtor should answer all
13 those questions truthfully and without invoking any
14 Fifth Amendment privilege rights.

15 THE COURT: I don't recall that I've actually
16 ruled on that question. Does that sound familiar to
17 any of the other parties?

18 MS. RILEY: That's correct.

19 THE COURT: That I have not?

20 MS. RILEY: That you have not.

21 THE COURT: Right.

22 MR. ALLRED: Well, then I misunderstood. I
23 beg your pardon.

24 THE COURT: I understand the Fifth Amendment
25 has been invoked, but nobody has asked me to rule on

1 what happens afterward.

2 MR. ALLRED: I thought when you signed the
3 order and required him to come in, that that order
4 required him to answer the questions. But I may have
5 misread the order.

6 THE COURT: Well, I don't recall that it says
7 anything about the Fifth Amendment, but I didn't go
8 back and look at it.

9 MR. ALLRED: Okay.

10 MR. LEAVERTON: I'm sorry, if I could be
11 heard on that, Your Honor?

12 THE COURT: Sure, Mr. Leaverton.

13 MR. LEAVERTON: The Fifth Amendment is an
14 issue waiting for the Court to resolve here. It has
15 been asserted by the debtor.

16 THE COURT: But there's no motions or
17 anything at this point.

18 MR. LEAVERTON: That's correct. But the
19 order that's being referenced that Mr. Allred saw, the
20 Canadian trustee will be taking the position that that
21 order had the effect -- intended effect of ruling on
22 Fifth Amendment issues that had been raised as an
23 objection, and that -- and I believe there's also a
24 stipulated order. And so there are issues of waiver
25 and prior determination and the rest that I just wanted

1 to be sure to make a record that the trustee wants to
2 preserve those issues for the Court.

3 Thank you.

4 THE COURT: Thank you, Mr. Leaverton.

5 MR. ALLRED: Okay. But getting back to the
6 issue of what rule applies, it seems to me that our
7 procedural rules, including the procedural rules -- if
8 our procedural rule is to have an open examination, the
9 fact that the Canadian examination maybe be a closed
10 examination is irrelevant. This foreign representative
11 has taken advantage of this court and can't change the
12 practices of this court.

13 With regard to comity, that, you know, is --

14 THE COURT: Just for the benefit of anybody
15 who's listening to a CD of this later and doesn't --
16 isn't familiar with it, this is c-o-m-i-t-y, not
17 c-o-m-e-d-y.

18 MR. ALLRED: Correct. With respect to that
19 time-honored principle that substantially antedates
20 Saturday Night Live, we -- the courts are willing to
21 honor requests from other courts, but only to the
22 extent that it doesn't violate some basic public policy
23 of this court. And if -- and this is an extreme
24 example, but it illustrates it -- if in Canada the rule
25 was that a debtor who didn't answer a question was to

1 be thrown in jail, you know, that doesn't bind this
2 Court as to what this Court may do with regard to the
3 debtor.

4 And if the press is a -- and the cases that
5 we've cited, in fact, all of the cases in the
6 pleadings, evidence the fact the press has -- that it
7 is a fundamental policy of the United States that these
8 court proceedings be open. And so this can't be
9 changed by the fact that it may be a closed proceeding
10 in Canada.

11 Now, to the basic -- the real hard question,
12 and that's the fight over whether or not what has
13 occurred and what will occur in the future, whether
14 it's somehow private discovery or whether it's an open
15 process. I would say as a preliminary --

16 THE COURT: I'm reminded of I think it's
17 Cohen's law that the name of the game is the label you
18 succeed in imposing on the facts.

19 MR. ALLRED: That's correct.

20 THE COURT: That may very well be true here,
21 that this is a categorization question, and once it's
22 categorized, then we sort of know how it comes out.

23 MR. ALLRED: Well, I offer tell my young
24 associates in my office that lawyers' jobs are figuring
25 out what bucket things go into. And once you figure

1 out what bucket it goes into, then you know what the
2 consequences are. The hard thing is figuring out what
3 bucket it goes into.

4 Here, though, I think actually what has
5 happened has made this Court's job a lot easier. And
6 that is that this proceeding was to be an open
7 proceeding and then was closed. In court document 49,
8 which is a stipulated order entered by the debtor and
9 the foreign representative in these proceedings in
10 which Mr. Thow was required to come and be examined,
11 that order specifically says that it is to occur on
12 Monday, October 29th, 2007 commencing at 9:30 at the
13 bankruptcy court for the Western District of
14 Washington, Seattle.

15 So this was an open proceeding. And what
16 happened was -- as the Court well knows -- is that the
17 press contacted, I think, chambers. I think the record
18 reflects that.

19 THE COURT: I think we noted on the docket
20 that that had happened and that we had advised parties.

21 MR. ALLRED: And then you advised the
22 parties. And then they come came up at the point of
23 time for the examination. And then there was a meeting
24 in chambers. And I presume in that meeting in chambers
25 the question obviously was asked, well, what do you

1 litigants want to do with regard to the fact that the
2 press is here. Then that came back out on the public
3 record, and a hearing was held.

4 And in that -- in that open proceeding, the
5 parties, Mr. Leaverton on behalf of the foreign
6 representative and, I believe, both counsel for
7 Mr. Thow, made their arguments and said that the
8 matters ought to be closed. And then this Court closed
9 it, closed the proceedings. And after hearing from the
10 press for a short period of time -- there were a few
11 reporters in the room -- and then the Court closed the
12 proceedings. And the only reason it was closed --
13 otherwise it would have been conducted here -- the only
14 reason it was closed was the fact that the press was
15 here.

16 So what's happened here is that these parties
17 have invoked an open process, and now they can't make
18 it into a private process, if it ever was to be a
19 private process. We don't think it is. But if it ever
20 was to be a private process, these parties have invoked
21 this open process. And now they can't turn around and
22 say, well, we really didn't mean it. And so as a
23 consequence, this is an open process.

24 And so what happened with the Court closing
25 it down and excluding the press, it is, in effect, like

1 a protective order. I mean, it has the same effect,
2 that it excludes people from -- in this case, the
3 press, from knowing what went on.

4 And so we think that, under the
5 circumstances, this is different from all the cases
6 cited by the debtor and the foreign representative. In
7 all those cases, none of them involved a situation
8 where the examination was to occur in court and then
9 was closed down. And so it makes this case easily
10 distinguishable from all of those cases.

11 THE COURT: I'm going to need to hear from
12 the other parties, and we've got, as I said, people
13 coming at 10:30. So I need you to sort of -- you know,
14 I don't know how far into your argument you are, but --

15 MR. ALLRED: Okay. Well, I'll try to make it
16 as quickly as I can.

17 Now, this Court, I think you had -- I think
18 it was Judge Overstreet's clerk locate some law for
19 you. I guess it's the Symington case, I assume, that's
20 being read.

21 THE COURT: Yes, actually, our legal extern.

22 MR. ALLRED: Okay. And the Symington case
23 and the ASTRI cases are those two cases out of Maryland
24 we think are the cases that the Court ought to focus
25 on. They're the cases which read and study the

1 background of the open process of examining debtors,
2 whether it appears in its form as a 341 hearing or
3 whether it appears in its form as a 2004 exam of the
4 debtor. It's the same thing. The purpose of that is
5 to examine the debtor as to his assets and liabilities
6 and to get basic background information.

7 Nobody disputes that a 341 hearing is open.
8 And here what's going on is you've got the functional
9 equivalent of a 341 hearing in a 2004 exam of the
10 debtor.

11 THE COURT: Well, one of the things that was
12 really interesting, particularly in Symington, is that
13 it seemed to conflate history under the Bankruptcy Act
14 and then rule 205 with what happened after the
15 enactment of the Bankruptcy Code in 1978 and then,
16 ultimately, rule 2004. And there was a change, because
17 the statute prior to the amendment of the code did call
18 for it to be conducted in court. And one of the major
19 and fundamental changes made by the bankruptcy code was
20 to take the judge out of a lot of the processes the
21 judge had taken part in before, like 341 meetings, for
22 instance. The cases don't address the implications of
23 that, if there are any.

24 MR. ALLRED: Well, I think the Symington case
25 does talk about that. And the way the Symington case

1 analyzes --

2 THE COURT: It just refers to it as if it's a
3 single unitary history --

4 MR. ALLRED: Well, what it refers to is part
5 of its analysis is whether these kind of examinations
6 have been historically open.

7 THE COURT: Well, and they certainly -- I
8 think it's probably right that they were prior to the
9 bankruptcy code. The question is does Congress
10 changing that part of the law, does that make a
11 difference?

12 MR. ALLRED: As Symington points out, they
13 didn't say they're closed. In other words --

14 THE COURT: No, but they didn't say they were
15 to be here, either.

16 MR. ALLRED: Pardon me?

17 THE COURT: They didn't say they were to be
18 here, either.

19 MR. ALLRED: No, they didn't say they'd be
20 open, but they're silent on the issue. And so that's
21 the reason the Court went back and looked at it,
22 historically what had happened. And in 2004 exams,
23 they are not the functional equivalent of discovery
24 between litigants. The cases are quite clear on that
25 point. In fact, as the Court knows, you can't use a

1 2004 exam -- the discovery obtained in a 2004 exam in a
2 piece of litigation. You perhaps might be able to use
3 it as an admission against interest or to impeach a
4 witness, but you certainly can't use it as any kind of
5 substantive evidence like you can deposition testimony
6 obtained where the parties are in a different context.

7 And so in that sense, I think this is clearly
8 an open proceeding. And I think those cases are the
9 only ones who have carefully looked at that issue. The
10 other cases cited by the foreign representative and the
11 debtor just assume that -- they assume it's somehow
12 private discovery. And it's not that, as the Symington
13 and the ASTRI cases demonstrate. These are open
14 proceedings.

15 And I also would point out -- and I think we
16 pointed out in our brief -- that the cases they relied
17 upon have very specific facts that are different from
18 what we have here. For example, in the ASTRI and the
19 Ionosphere Clubs cases, those examinations were
20 conducted pursuant to protective orders that shielded
21 the trade secrets of third parties. So that kind of
22 thing is the kind of thing under 107 you don't even
23 have a right to get.

24 And in the Enron case, the court was
25 concerned about a third party involved in litigation

1 elsewhere using the 2004 exam in preparation for its
2 own litigation in that third -- in that non-bankruptcy
3 court.

4 And then they finally rely quite a bit on the
5 Seattle Times versus Reinhardt case, which our office
6 litigated, actually. And in that case, what the
7 Supreme Court said is a litigant in a two-party dispute
8 -- the Times had been sued by Mr. Reinhardt over
9 publication of articles. And what the Times wanted to
10 do is to use the discovery that it was obtaining to
11 write further stories about the Reinhardt matter. And
12 the Supreme Court said, no, you can't take private
13 discovery and then turn around and publish it. That's
14 an improper purpose.

15 But here, this is not -- the press here, the
16 media here in this case, has no particular axe to
17 grind. They're just trying to get to the truth and
18 trying to serve their public.

19 And I guess, because of the time, the only --
20 the last thing I want to say is it is clear that the
21 burden rests upon the foreign representative and the
22 debtor to specify clear reasons why the press ought to
23 be excluded. The First Amendment makes that burden
24 quite high. There has to be some compelling state
25 interest. And so they have simply not met their

1 burden, even under a lower standard. They have some
2 generalized concerns, but no specifics about what
3 actually might happen. The only thing that it seems to
4 me that even rises to the level of a matter that might
5 be of some concern is whether third parties in these
6 other countries might -- the creditors might go and
7 grab assets down there.

8 And as the Court knows, Chapter 15 is based
9 on a U.N. treaty, and those other countries,
10 particularly in Europe and the Caribbean, have all
11 adopted the -- the functional equivalent of Chapter 15.
12 So the foreign representative certainly has the power
13 to go down and to do that. So the foreign
14 representative has a way of protecting itself in case
15 that ever happened.

16 We're not asking -- the press is not asking
17 for Social Security numbers, bank account numbers,
18 those kinds of things. We're asking to attend the
19 depositions going forward and to copy the transcript
20 with the appropriate redactions made in those areas.
21 If there are other areas where they want to redact
22 information, then obviously, we'd like to be heard.
23 But on Social Security numbers and bank account numbers
24 and those kind of things, we don't need that.

25 THE COURT: Well, as of the first of

1 December, we're going to have a new rule about
2 redaction of identifying information in court filings
3 that will be in effect, unless Congress does something
4 in the next three weeks.

5 MR. ALLRED: Oh, so if it's a transcript on a
6 2004 exam, I'm not sure the court reporter would
7 redact --

8 THE COURT: No, there's a procedure that we
9 have set up under a general order for how to get
10 transcripts redacted before they actually become
11 publicly available.

12 MR. ALLRED: Well, the point I'm making here
13 is that the press is not asking for that kind of
14 detailed information. The media here is just simply
15 trying to report a story. And they have very important
16 interests in reporting that story. The allegations are
17 that he stole \$30 plus million from a lot of people,
18 and they have a right to know about what's going on in
19 these proceedings.

20 Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Allred.

22 Mr. Leaverton, just a preliminary question.
23 Has the Canadian trustee asked for recognition of -- as
24 a main proceeding in other countries besides the U.S.
25 that you know of?

1 MR. LEAVERTON: Not that I know of, Your
2 Honor. I don't believe so.

3 THE COURT: Okay.

4 MR. LEAVERTON: I would like to preliminarily
5 address the Court's question about is this a matter
6 that requires a ruling right away. I don't think it
7 is. Of course, we worked pretty expeditiously here.
8 Time was short. And there's a pretty substantial
9 record that the Court has, and as the Court noted, some
10 very substantial and interesting and difficult issues
11 to address. And I understand there's a docket in about
12 10 minutes, and that leaves me roughly five if I give
13 equal time to the debtor. And I can't possibly --

14 THE COURT: No, I know you can't. And we
15 probably won't start the other matter right at 10:30.

16 So Mr. Chen, if you see your fellow
17 litigants, it's going to take me a bit longer with this
18 hearing.

19 MR. LEAVERTON: I would also note that I
20 think the claim of urgency is a little hollow when you
21 consider the fact that this bankruptcy case in Canada
22 was filed in 2005, the latter part of 2005, more than
23 two years ago, and the events that are in being
24 investigated as newsworthy are of some vintage. And I
25 don't believe there's any kind of urgency in regard to,

1 you know, the public's interest in knowing some kind of
2 recent event sort of issue. That just isn't in the
3 record, and I think no one would contend that.

4 As far as the imminence of a continued
5 examination, I think the trustee stated before and will
6 state again, we're not going to proceed with this
7 examination until the Court has had time to really
8 resolve this issue on a thoughtful and deliberate
9 basis.

10 The transcript, it is true, may be issued
11 here at any time. I believe I have seen a draft of it
12 that has not been reviewed by the debtor. But I don't
13 think any of this should cause the Court to feel or the
14 parties to feel that we have to rush to make this
15 decision. Enough said on that topic.

16 And I'd like to -- I think, you know, in
17 terms of the bucket analogy -- and I probably say the
18 same thing to my colleagues. And we all know law is a
19 system of categories and classifications and rules and
20 the like. I can there's a third bucket here, Your
21 Honor. I don't think -- and that really is the reason
22 we're having a difficult time. Because 2004
23 examinations -- and as Your Honor noted are a product
24 of fairly sweeping amendments to the bankruptcy laws in
25 this country -- really involve a different animal.

1 And most of the case law, I would submit --
2 other than Symington, which is getting pounded on
3 pretty heavily here by the media as authority -- with
4 that exception, most of the courts are recognizing it
5 to be more akin to discovery. In fact, if you were
6 putting it on the continuum of a 341 meeting on one
7 extreme, let us say, and a deposition on the other, you
8 would place the 2004 exam clearly on the discovery side
9 of that ledger. In fact, it would be even further to
10 the extreme, because as we know, discovery is limited
11 by framed issues and relevance and other kinds of
12 considerations. Those 2004 exams, while they're not
13 total free-for-alls, are much more sweeping in terms of
14 the scope of the examinations that can be taken.

15 So I think it's very important that if we're
16 going to use a bucket analogy, we're really dealing
17 with a different animal here. And it's probably more
18 like a barrel than a bucket. It's a very, very big and
19 substantive part of bankruptcy process that we're
20 dealing with here. And I think this -- the Court's
21 issue that's before it has very, very significant
22 implications for how bankruptcies are conducted in this
23 country and how reliant trustees and other parties in
24 interest are on this tool being private and remaining
25 so.

1 I think it's important to consider how we got
2 here. And some of this I don't think has really been
3 adequately emphasized in the record. But in November
4 of 2005, the Court entered its order recognizing the
5 foreign main proceeding being the Canadian proceeding.
6 At that time, Your Honor, Mr. Thow had, I believe --
7 I'm trying to remember the order of this -- but at
8 about the same time, he had filed a Chapter 7 in this
9 court. He came here and sought the application of U.S.
10 bankruptcy law to his situation. And this court -- it
11 was Judge Overstreet, actually -- entered an order
12 dismissing that case for bad faith filing in view of
13 his voluntary previous filing of the Canadian action.

14 And so I think, you know, it's important to
15 bear that history in mind, that this court has already
16 determined this is a Canadian matter, one that the
17 Canadian court should have the lead on. And so we're
18 here today, not sitting in the ordinary context of the
19 court's own administration of a bankruptcy estate under
20 one of its more substantive chapters, Chapters 7, 11 or
21 13 or the like. We're in a very strange animal here.
22 We're in Chapter 12 --

23 THE COURT: 15.

24 MR. LEAVERTON: I'm sorry. 15.

25 THE COURT: Animals go with 12.

1 MR. LEAVERTON: Thank you, sorry. That
2 order, I think there's some important provisions there.

3 THE COURT: This is the order that --

4 MR. LEAVERTON: Order recognizing --

5 THE COURT: Oh, the recognition order.

6 MR. LEAVERTON: Apart from the finding that
7 this is a foreign main proceeding, which really sets
8 into play all kinds of substantive provisions of
9 Chapter 15, the Court also ordered that, "The debtor
10 shall, on reasonable notice, make himself and pertinent
11 records and other documents available for inspection
12 and examination under oath by the Canadian trustee."
13 And it goes -- the order goes further on to state,
14 "Ordered that the debtor shall cooperate with the
15 Canadian trustee with respect to its rights and duties
16 under this order and as the recognized foreign
17 representative with respect to the Thow Canadian
18 bankruptcy case."

19 What that really gets to is -- and what
20 happens in every bankruptcy case, as the Court is
21 aware, where there's a trustee, is there are duties of
22 the debtor to cooperate. And the kind of information
23 that the Canadian trustee is seeking here in the
24 ordinary case wouldn't even involve a 2004 exam. It
25 would involve an office visit. It would involve the

1 debtor complying with the statutory requirement to
2 cooperate with the trustee.

3 And none of those matters would be of public
4 record. And what's happened here, since the -- and
5 really, that's in the discharge of the trustee's
6 ordinary duties. And what happened here was beginning
7 in November of 2005 -- I think it was December -- I
8 think the first 2004 exam request was in December of
9 2006. In that intervening year, the trustee made all
10 kinds of investigations and has continued to make its
11 investigations. But this is a very, very long-standing
12 and difficult effort the Canadian trustee has
13 undertaken to get at fundamental financial information
14 and a history of the debtor's financial affairs, which
15 really should be on the threshold of any bankruptcy
16 case without the necessity of court intervention or
17 discovery orders of 2004 exams or any of those things.
18 And that's the context we're in.

19 And the record, I won't go into all the
20 details of the record, but I think the docket here
21 really shows the long difficult effort the trustee has
22 undertaken, the lack of cooperation the debtor has
23 provided in terms of the debtor's duties under law and
24 under the order I just recited from. And so
25 ultimately, this culminated in an order issued by Judge

1 Burnyeat out of the British Columbia Supreme Court.

2 Now, Judge Burnyeat's order -- if I can grab

3 it here -- that's why we're here today is because of

4 Judge Burnyeat's order. It ended up that the parties

5 were able to stipulate and agree to an order

6 implementing the judge's order. And that's the order

7 counsel, Mr. Allred, referred to as the stipulated

8 order, recorded order 2004 examination and document

9 production. And that document has attached to it a

10 number of exhibits, but it includes Judge Burnyeat's

11 order, which is Exhibit B.

12 THE COURT: This is the order -- stipulated

13 order of June 18th of this year or earlier one?

14 MR. LEAVERTON: This is actually -- the order

15 I'm referring to now, Your Honor, is October of 2007.

16 MR. ALLRED: It's docket 49.

17 THE COURT: All right. Thank you. I just

18 don't want to get the wrong stipulated order.

19 MR. LEAVERTON: Having had such a difficult

20 time with Mr. Thow in getting compliance with this

21 Court's orders and generally getting access to the

22 ordinary information that any trustee would need, the

23 trustee went to the Supreme Court of British Columbia

24 and sought an order to help direct this Court in its

25 efforts to comply with Chapter 15 and help the main

1 foreign proceeding.

2 And so in Section 3 of Judge Burnyeat's
3 order, it states that, "Such examination be conducted
4 in the presence of the U.S. court judge or,
5 alternatively, at or nearby the courtroom of the judge
6 presiding over the bankrupt's Chapter 15 case," and
7 here's the important part, "such that the bankrupt may
8 be brought before the judge in person, and the U.S.
9 court can readily enforce this order with appropriate
10 sanctions should the bankrupt fail or refuse," as he
11 had done in the past, "to testify, produce documents or
12 otherwise comply in any respect with this order."

13 And then the order goes on and in Section 4 5
14 states that, "the U.S. court cause or permit a
15 transcript of such examination, together with a copy of
16 all documents produced by the bankrupt, to be provided
17 to the trustee."

18 Now, Mr. Allred, I think in his reply and
19 then this morning, has really been pursuing a kind of
20 quasi-waiver theory, that this order involve the
21 trustee having an examination at the courthouse, sort
22 of like what happened down at King County Superior
23 Court on a supplemental proceeding. Your Honor may
24 recall, you get a judgment, and the Court will
25 sometimes send you into a conference room with a court

1 reporter, and is there basically as an enforcement
2 remedy to get at information.

3 That's really the role that the Court had
4 here under this order, was not to conduct a proceeding
5 or a trial or determine a dispute in the substantive
6 bankruptcy case or determine the interests of -- the
7 pecuniary interests of parties or any of the sorts of
8 things that really trigger these access rights that
9 Mr. Allred is asserting.

10 The only role the Court was to have, and the
11 only reason that the examination was here, was in the
12 event the Fifth Amendment was invoked -- which it has
13 been -- or there were other disputes, to have this
14 court available to respond to those issues.

15 And so I think it is really conflating the
16 situation to contend that there's some sort of -- that
17 this proceeding has changed its character from a 2004
18 exam, or that the press has some sort of special right
19 because the trustee sought -- or Mr. Justice Burnyeat
20 sought to have this court assist him with, really, kind
21 of ending the daisy chain of motions and orders and
22 disregard and the like that have really been --
23 characterized the efforts and which I think are really
24 evidenced in the docket.

25 Now, the issue that Your Honor started with,

1 which was, I suppose I'll call it the Chapter 15 issue,
2 which is what is the choice of law or the applicable
3 law, to what extent is comity an issue in this case, et
4 cetera.

5 The Canadian trustee would submit that, given
6 the fact that what we're really doing here is an
7 ancillary proceeding to this foreign main proceeding,
8 that the -- I don't think there's any dispute that the
9 Canadian creditors are -- that substantially all of the
10 creditors of the estate are Canadian citizens. That's
11 why you have Canadian press here and not Seattle press
12 or some other U.S. interest represented.

13 So we have before this Court a proceeding
14 with a limited objective of advancing the Canadian main
15 case to assist the Canadian trustee in examination of a
16 Canadian debtor. Now, he happens to be a U.S. citizen,
17 I'll grant you. And I'll get to that in a minute. But
18 he is a Canadian debtor. And his case is pending in a
19 Canadian bankruptcy court with a Canadian judge with
20 Canadian creditor representatives and, overwhelmingly,
21 almost all -- I think in candor I have to tell Your
22 Honor, there may be one or two FedEx claims or
23 something from -- that may cross the border, but
24 overwhelmingly, it's a Canadian case.

25 I think that should weigh heavily in the

1 Court's thinking about how the proceeding that the
2 trustee is undertaking here should be regarded. And
3 really, we'll get to in a minute, I think it's 1506.
4 Mr. Allred referred to 106. I don't think 106 and
5 sovereign immunity applies. I quickly looked at the
6 statute, and I don't see anything in there that really
7 addresses this. I think if you want to go to the code
8 section that would potentially be pertinent, it's 1506.

9 And all that says is that -- and it's sort of
10 of a curb on what is otherwise in 1525. The Court is
11 instructed, and there's the word "shall," which is
12 pretty unique. You know, usually courts issue orders
13 and "shall" goes to other people. But this statute
14 directs the Court with a "shall," which is a fairly
15 unique looking statute from that regard.

16 And it says, This court shall, quote,
17 "cooperate to the maximum extent possible," unquote.
18 That's what 1525 says. Maximum extent possible with
19 the foreign court and its representative. So that's a
20 pretty heavy directive.

21 And then the only curb on that is 1506. And
22 that curb, again, is stated in terms of, I think, a
23 heavy burden. It says the only time you're not
24 required to do that as a court is if, quote, "the
25 action you were going to take would be" -- I'm sorry --

1 "manifestly contrary to the public policy of the United
2 States," unquote.

3 Now, in some ways this is a duel between
4 Mr. Allred trying to wrap himself up in the flag of
5 freedom of the press and the First Amendment and me
6 trying to wrap myself up in the flag of trustee's
7 rights and the way that the courts function and the
8 rest.

9 But if we were going to talk policy, I think
10 the Canadian nexus that exists with this case, the
11 Canadian law that -- the substantive law that applies
12 here and the reasons for the Canadian government's
13 having enacted such laws and how that's supposed to fit
14 into -- I have to confess, I'm not a real student of
15 Canadian law, and I do have Mr. McLean on the telephone
16 as my co-counsel and a Canadian lawyer. But the
17 Canadian government had, presumably, pretty good
18 reasons to set up a regime that involves the trustee
19 conducting his examination in private without the right
20 of private parties to be there.

21 They have different rules, Your Honor, on how
22 they handle discharge or objections to
23 dischargeability. They have all kinds of nuances in
24 that law that, you know, we could go into but I don't
25 think are directly pertinent.

1 THE COURT: And it's blessedly short.

2 MR. LEAVERTON: Right. But I think it's
3 important to take cognizance of the fact that what's
4 being done here is going to have no real moment in this
5 court. It's going to have an impact in that court in
6 Canada, and it's going to be used in that proceeding.
7 And it's going to inform the rights -- substantive
8 rights of the parties before that court. And, you
9 know, I think there's a reference to the term "lis,"
10 that the Canadian courts basically have determined that
11 there's no lis in this sort of a proceeding. Now my
12 Latin is ancient and long ago, but I assume that means
13 something like dispute or controversy, you know, some
14 claim or controversy that the Court has to determine.

15 Well, the Canadian court has determined that
16 these sorts of proceedings, there is no lis. If you
17 have no lis, you've got no right to press access, you
18 have no right to other party -- not only that, they
19 draw a tighter circle. No other parties, really, are
20 permitted to attend.

21 In our case -- I mean, in my experience, 2004
22 exams are very often group examinations. You'll have
23 other parties in interest who want to sit in. That
24 will happen from time to time. In the interests of
25 economy, every bankruptcy lawyer knows that depositions

1 and discovery are expensive and it's much more
2 efficient if everybody shows up at the same time and
3 asks the same sorts of questions. And so in my
4 practice, that's very common. In all the years I've
5 been practicing, I have never seen a press
6 representative at an examination, nor have I ever seen
7 an uninvited member of the public who's not a party in
8 interest sit in on a 2004 examination.

9 So I think with that background, I would just
10 urge the Court that I think the Chapter 15 rubric, I
11 think the injunction of Section 1525 are important
12 considerations in determining the issue here, and that
13 I think they -- I think -- you know, Your Honor asked,
14 are you conducting Mr. Burnyeat's proceeding in the
15 substantive Canadian law? Or are you conducting under
16 U.S. law and issues of comity? I would submit to Your
17 Honor, I think maybe that issue doesn't have to get
18 reached. I think it's a difficult concept to get my
19 mind around, that you're a Canadian judge conducting a
20 Canadian proceeding in U.S. court.

21 But I think comity is really embedded in the
22 Chapter 15 statutes themselves. And I think the
23 statutes give the Court guidance. And I think the way
24 it reads to me, we can get kind of caught up in these
25 labels of 2004 exams. We could have sought an order of

1 the Court, a more general order of the Court under
2 Chapter 15 and not refer directly to 2004. But 2004, I
3 think, is a very broad and malleable tool, and it takes
4 color from the circumstances it's in. Mr. Allred would
5 have that it's a 341 proceeding. That's the equivalent
6 of that. And the Symington court seems to say that.
7 And if I have time, I'll get into that, because I think
8 that's patently wrong.

9 And in fact, although it's a little bit
10 different, I think the practice is 341 meetings are
11 treated as public meetings. I think if you look at
12 rule 5001, you look at 341, which as Your Honor noted,
13 the judge is disinclined to attend, I'm not ready to
14 conclude that it is a public proceeding or that there
15 is a right to attend that. In practice, I don't think
16 parties are excluded. And very often they're in public
17 forums, like in big cases where people couldn't be
18 effectively excluded.

19 But there is -- a 341 meeting is a very
20 different animal from a 2004 exam.

21 THE COURT: Well, I've got people waiting on
22 the other case. If this is a good point, let's hear
23 from either Mr. Feinstein or Ms. Riley. I take it it's
24 Ms. Riley, from earlier argument. And then I do want
25 to get to the other case, at least by 11:00.

1 MR. LEAVERTON: All right. Let me just make
2 sure I haven't left out anything I really wanted to
3 make a record on.

4 THE COURT: Sure. No, these are intricate
5 and involved issues.

6 MR. LEAVERTON: I just -- I'd like to close,
7 and I'll be very brief. I think there's a lot at stake
8 here. And the reason for it is there's a very
9 interesting and difficult but important distinction
10 between a 341 meeting of creditors, which is not a
11 judicial proceeding. And there is a -- parties can go
12 in a 341 meeting. They can ask questions. They don't
13 have to have lawyers. And there's a case, In Re
14 Maloney, 249 Bankruptcy Reporter 71, that ruled on -- I
15 think there was someone contending that a creditor
16 asking questions was practicing law on an unauthorized
17 basis. And the Court made an interesting statement.
18 It said that it's not an appearance before a public
19 tribunal and that, therefore, it doesn't invoke the
20 issues regarding the practice of law.

21 So a 341 meeting is this first meeting.
22 Creditors are invited, and they get to ask questions.
23 The trustee's there. The U.S. Trustee's Office, as you
24 know, typically asks some questions. That's a
25 different sort of proceeding. And if we were debating

1 that today, it would be a different sort of an inquiry.

2 The 2004 exam conducted by a trustee, which
3 is what's going on here, or by any other party in
4 interest, is a totally different animal. And it is, I
5 think, critically important to the bankruptcy process
6 that it can be conducted in a private fashion.

7 Now, if the parties elect to submit something
8 into the Court record, that's when Mr. Allred's
9 clients' rights get triggered. But when the trustee is
10 just setting about investigating the affairs of the
11 debtor, or a creditors committee doing it, to have the
12 Victoria television station as partner in the room
13 while this investigation is being undertaken is an
14 absolutely ruinous approach to bankruptcy
15 administration. And I think it will have severe and
16 far-reaching consequences if the Court were to go down
17 that road.

18 Fundamentally, the trustee here wants to do
19 his job. The creditors who are, as a body, represented
20 by the inspectors -- and I did want to note on the
21 record, I think there's an error in Mr. Cheever's
22 declaration. There are four inspectors, not five. He
23 wanted me to make that point.

24 THE COURT: Right.

25 MR. LEAVERTON: But he does not want to

1 become Geraldo Rivera. He's not an investigative
2 reporter. He doesn't want to be the cub reporter for
3 the newspapers of Victoria. He doesn't want the
4 newspapers of Victoria assisting him in doing his
5 investigation. He thinks he knows how to conduct that
6 and how to do that.

7 As I say, and as I stated I guess, when I
8 first addressed the Court this morning, the press
9 really does, in relation to a 2004 exam -- which is not
10 of record in the court -- stand in the relation of the
11 general public. They don't have any greater rights
12 than one of my colleagues standing here -- that's not a
13 good example -- but some disinterested third-party
14 individual wanting to come in and sit in here because
15 they're interested in the situation.

16 So I have more that I would add, but I think
17 the main points have been covered, Your Honor.

18 THE COURT: Thank you. Ms. Riley?

19 MS. RILEY: Thank you, Your Honor. I will be
20 brief, not only in the interests of time, but as a
21 criminal defense lawyer, there's only so much
22 bankruptcy law I would cram into my brain in one week.
23 And so for that reason alone, I would like to reserve a
24 couple of moments for Mr. Feinstein to address the
25 Court.

1 I think Mr. Leaverton addressed many of the
2 concerns that the Court had with regards to deference
3 to the Canadian trustee and what rules apply, whether
4 it's Canadian or American. So I'm not going to go into
5 that this morning. I think the Court has enough
6 information before it from the standpoint of briefing
7 and argument.

8 However, I do think it is important for the
9 debtor to respond to the primary issue in this case in
10 this matter. And that is whether or not this is a
11 standard discovery proceeding or whether or not this is
12 a public court proceeding where the press is presumed
13 to have public access. And we would argue to the Court
14 that that is not the case. This is not a public
15 proceeding.

16 THE COURT: And the presumption, if it's
17 discovery, is that it's not -- unless and until
18 something is filed in the court, it's not open.

19 MS. RILEY: Filed with the court or on the
20 court's record, correct.

21 The news media pointed to the stipulated
22 order that was entered in this case bringing my client
23 to this courtroom for the deposition last Monday. And
24 I think what needs to be clarified -- and I think
25 Mr. Leaverton made a good record on this issue -- is

1 this has been a contentious proceeding. It has gone on
2 for a number of months.

3 And this was the best way to get Mr. Thow
4 into court to respond to questions and have a judge
5 available if issues such as the Fifth Amendment arose
6 that needed to be resolved immediately. That is the
7 reason why we were in this courthouse, not because this
8 was a public proceeding, per se, but to have the Court
9 available if need be. We were in a conference room.
10 It could have just as easily been a conference room
11 next door. The fact that we're in this courthouse has
12 no bearing on whether or not it was a public
13 proceeding. So I'd argue to the Court that that was
14 not the case, as contended by the media.

15 In addition, as Mr. Leaverton pointed out in
16 his brief, the news media is not a party in interest to
17 this 2004 examination. Much of the case law that has
18 been cited by the news media revolves around public
19 access being given to other parties in interest to the
20 proceeding. The news media is not a party in this
21 matter. And I think that is a clear point that needs
22 to be addressed.

23 The whole idea of media access to the
24 examination contradicts the purpose of a rule 2004
25 examination, at least from what I have gleaned from the

1 case law. The purpose of the rule is to allow for a
2 broad examination and inntrospection into a debtor's
3 finances. This means that there may be information
4 that comes out of the examination that's completely
5 irrelevant, goes beyond the scope of a court
6 proceeding. And for that very reason, it is allowed to
7 be somewhat of a fishing expedition, as I mentioned
8 earlier. Very different from a court proceeding or
9 other public hearing where a witness is placed under
10 oath on a court record.

11 There are a number of reasons that have been
12 articulated in the briefing, not only by myself, but by
13 Mr. Leaverton, as to why the media should not be
14 permitted access into this proceeding and in future
15 2004 proceedings, and that's to preserve the integrity
16 of the examination. My client wishes to cooperate to
17 the extent that he can. And in order to do that, he
18 needs to be able to be in a forum where he can provide
19 information to the trustee to satisfy the trustee's
20 inquiries and to prevent undue and unnecessary
21 disclosure of either superfluous information or
22 personal information that may be detrimental to him in
23 the long run.

24 We have a number of creditors in Canada who
25 are paying very close attention to this bankruptcy

1 bankruptcy proceeding, which is somewhat unusual. They
2 are very involved, and they are wanting to know
3 everything that is going on about this. My client has
4 received --

5 THE COURT: You're saying this bankruptcy
6 proceeding meaning the Canadian proceeding?

7 MS. RILEY: The Canadian proceeding, sorry.
8 My client has received threats. You know, it's really
9 gone beyond any sort of a traditional bankruptcy
10 proceeding. And that is because of the close attention
11 that the media and the Canadian creditors have paid to
12 it. Because of that, the concern of the media getting
13 involved creates a huge concern, from the standpoint of
14 my client, that this could spiral out of control.

15 Mr. Leaverton also pointed out very
16 articulately that the Canadian trustee has very
17 different and also very legitimate concerns about other
18 third-party creditors getting involved. There is good
19 cause that has been shown to keep the media out of this
20 examination.

21 I think it's also important to point out that
22 a lot of the cases that have been cited in this motion
23 have involved situations where the Court has issued a
24 protective order. This is not a situation where there
25 is a protective order in place. And that is because of

1 the way the proceedings took place on Monday. It was
2 not a proceeding where we needed a protective order
3 because it wasn't a public proceeding, per se.

4 I think I've, for the most part, summed up
5 the pertinent parts of my argument. Obviously, there
6 are more contained within my briefing. I know
7 Mr. Leaverton's touched on all the other issues that
8 the Court wished to have addressed. And I believe
9 Mr. Feinstein would like to address the Court on a
10 couple of other more specific matters that,
11 unfortunately, I can't address because of my minimal
12 level of expertise.

13 Thank you.

14 THE COURT: Mr. Feinstein?

15 MR. FEINSTEIN: Judge Zilly, I think,
16 answered our -- one of the questions this morning at
17 our bankruptcy breakfast when he said the bankruptcy
18 rules are just rules. They're just procedural rules of
19 how you do things, what you do, what kind of forms you
20 file, what kind of papers. They're procedural rules.
21 They don't affect the substantive rights.

22 For instance, in Chapter -- when the Court
23 issues a ruling and an order under bankruptcy rule
24 2004, that's just a procedural rule that says that as a
25 procedure, when somebody wants to take an examination

1 of somebody else -- it doesn't have to be the debtor;
2 any party can take an examination of another party --
3 there's a procedure to do that. You can go to the
4 Court, you can file a motion, and the Court can issue
5 an order compelling. Those are procedural rules. As
6 Judge Zilly says, those don't affect substantive
7 rights.

8 Now, you go back to the substantive rights of
9 the code to see what the substantive rights are. There
10 is no 341 meeting of a debtor in a Chapter 15. Chapter
11 341 -- or Section 341 does not apply to debtors in
12 Chapter 15. 341 is defined, in fact, as a debtor who
13 is a debtor for a petition for relief under Section
14 301, which is a debtor under a Chapter 7, 11 and 13.
15 So Chapter 15 debtors, even though it's a defined term
16 in Chapter 15, the debtor is defined as the entity
17 subject to the foreign proceeding. He's not a debtor
18 under Section 341 or Section 301 that's required to
19 appear for that kind of examination.

20 THE COURT: But presumably, if there had been
21 no examination at all in Canada --

22 MR. FEINSTEIN: Take a look at Section
23 1521 --

24 THE COURT: But let me finish the question.
25 Presumably, if there had been no Section 341 equivalent

1 -- it doesn't have to be Canada, any foreign proceeding
2 -- and that the foreign law provides for such an
3 initial debtor examination, presumably under Chapter
4 15, once recognition is granted, the U.S. court could
5 order that kind of examination here.

6 MR. FEINSTEIN: The Court can order that type
7 of examination as a procedure under 204, because those
8 are procedural rules.

9 THE COURT: Or essentially, under not even
10 2004. 341, all comers kind of meeting of creditors
11 would presumably be something a court could order on a
12 case-by-case basis, once recognition is granted --

13 MR. FEINSTEIN: Certainly. We're not
14 challenging that you ordered him to appear and he did
15 appear or we're not going to appear. The substantive
16 provisions of Chapter 15 are the 1521 procedures. And
17 none of those 1521 procedures require a debtor to
18 appear for an examination. The trustee can take
19 possession of assets, lawsuits can be stayed, assets
20 can be protected, sold. There is nothing under the
21 1521 rules like Section 341. And 341 only applies,
22 like I said --

23 THE COURT: I understand that part of the
24 argument.

25 MR. FEINSTEIN: Under 301. So the argument

1 here is that just because there was an examination
2 under 2004 creates a public proceeding. 2004, like
3 Judge Zilly said, is just a procedural rule. It's just
4 how you do things. So the trustee can come down and
5 use that rule and ask this Court in furtherance of the
6 Chapter 15 procedures, to ask the debtor to appear and
7 testify in an examination. But it's not necessarily a
8 public proceeding. It's not a proceeding, like the
9 argument earlier on 341, because there is no 341 in
10 Chapter 15's. So they're just trying to codify that
11 when the Court issues rules under 2004, those are just
12 procedural rules to accomplish what the trustee's
13 asking the Court under Chapter 15. So it's does not
14 necessarily creates a public procedure.

15 THE COURT: Thank you. Just for clarity in
16 the record, Mr. Feinstein alluded to remarks by Judge
17 Zilly. That was at a breakfast meeting of the
18 bankruptcy section of the Federal Bar Association this
19 morning here in Seattle. And Judge Zilly has just
20 completed a term as the chair of the advisory committee
21 on bankruptcy rules of the judicial conference of the
22 U.S., and was just sort of recounting his history and
23 where it fits into the process. Roughly 100 folks were
24 there. I was there, Mr. Feinstein was there. Lots of
25 other folks were there.

1 Mr. Allred, brief response?

2 Let me tell you what I'm planning to do after
3 this. I'm planning to take a recess. We'll talk very
4 briefly, after Mr. Allred concludes, on when we
5 reconvene. I'll have to take a very short recess
6 before I come back for the Chen matters, but that
7 shouldn't be more than about five minutes.

8 So Mr. Allred?

9 MR. ALLRED: Thank you, Your Honor. I will
10 be brief.

11 In the order which Mr. Leaverton cited that
12 the Canadian court issued, it says --

13 THE COURT: I have it on the screen as well.
14 It's attached to docket No. 49.

15 MR. ALLRED: Oh, here it is. Yeah, it's
16 docket 49. If you go to the order, it says -- and in
17 paragraph 3, it says, "that such examination be
18 conducted in the presence of the U.S. court judge or,
19 alternatively, in a nearby courtroom for the judge of
20 the U.S. court." So it was intended to be a proceeding
21 where this court was actively and affirmatively
22 involved in the process. And that's what occurred.

23 When the parties came here, there was an open
24 proceeding. And my -- we had the transcript run, and
25 as best I can read it, which isn't very good because of

1 the quality of the reporting, but this court said --

2 THE COURT: This is of the hearing?

3 MR. ALLRED: The hearing on the 29th.

4 THE COURT: There's no transcript on file at

5 this point.

6 MR. ALLRED: Right. I'm just reading from

7 what I have, and this may or may not --

8 THE COURT: So I take it that's a transcript

9 somebody in your office did from the CD.

10 MR. ALLRED: Yeah, we ordered a copy of the

11 recording and made, as best we can, a copy of the

12 transcript. But basically, you said, "My instinct is

13 that there is not a significant prejudice in allowing

14 the examination to go forward today on a closed basis.

15 If various press representatives or your organizations

16 want to move to intervene and seek a transcript, a

17 notice of motion to that effect would be appropriate."

18 And so it was intended to be an open

19 proceeding, and it would have been an open proceeding

20 but for the fact that the press was there. And so it

21 seems to me that that is a fundamental distinction that

22 this Court needs to keep in mind when it makes its

23 ruling.

24 THE COURT: Well, I should say it's not at

25 all clear to me that -- you mean open proceeding

1 meaning in the courtroom. It's not at all clear to me,
2 had there been no press interest and no issues,
3 contentious issues arising in the examination, that I
4 would have had anything at all to do with it. I think
5 it was not going to be in the courtroom precisely
6 because the recording system is always on in here. It
7 was going to be in a conference room. That was
8 certainly my expectation beforehand.

9 MR. ALLRED: Well, the order says it's to be
10 here at the courthouse.

11 THE COURT: Well, the courthouse, yes.

12 MR. ALLRED: This is fundamentally different
13 than having something done at some lawyer's office,
14 which is where 2004 exams usually occur.

15 And then with this issue of comity, and what
16 the nature of Chapter 15 is, the point is -- and I come
17 back to this and I just reemphasize this court -- that
18 they've invoked the powers of this court to do a lot of
19 things. And that includes if they invoke those powers,
20 then under those circumstances, our procedures with
21 respect to the press are applicable. The cases make
22 quite clear that the press is entitled to be in these
23 kind of proceedings.

24 So we would urge the Court to so rule, at
25 least under these circumstances. If the Court wished

1 to distinguish this from general 2004 proceedings, it
2 has a basis in doing that, given the fact that they've
3 invoked the Court in coming up here to the courthouse.

4 THE COURT: Let me tell you what I'm -- just
5 in terms of timing. There are really two possibilities
6 -- three. I am not certain that I'm going to do a
7 written decision. But there are some really important
8 issues here, and I find that it sometimes helps me to
9 sort them out to do a written decision. If I do a
10 written decision, that will take some time.

11 My instinct right now is simply to say I'd
12 like to reconvene this hearing to mid afternoon, say
13 3:00 or something like that. I may have a ruling at
14 that point. We could do it tomorrow morning and have
15 it to the same -- have the same kind of session then,
16 if that's better for people's schedules. Or I may say
17 I'm going to take it under advisement and do a written
18 decision. I just don't know at this point. But I need
19 some time to think through that, and I can let you
20 know, as I say, either this afternoon, tomorrow
21 morning. I'd prefer not to do it tomorrow afternoon,
22 but it could be the afternoon if that's necessary for
23 the parties.

24 So I would suggest -- my first sort of
25 suggestion would be to say 3:00 this afternoon.

1 MR. ALLRED: Your Honor, would that be to do
2 further argument or just to get your ruling?

3 THE COURT: To get -- I might ask -- it's
4 possible I would ask something further. But I think
5 what I have in mind is just either to give a ruling or
6 to say this is where I think I am, and here's how long
7 I think it's going to take to get you a ruling. But I
8 don't know for sure which it would be at this point.

9 MR. ALLRED: The reason I ask that is because
10 all of us have hauled up quite a bit of paperwork. If
11 we have to stick it somewhere --

12 THE COURT: It can certainly be -- the
13 courtroom will be secure when we're not in session, so
14 that's not a problem if you'd like to do that.

15 MS. RILEY: Your Honor, I would just like to
16 interject. I do have a scheduling conflict. I have to
17 be on a plane this afternoon at 3:00. So I will be out
18 of the state this afternoon and tomorrow. If the Court
19 is just inclined to give a ruling and not ask for
20 additional argument, then I'm certain that you can
21 proceed without me. Mr. Feinstein has indicated that
22 he's not available this afternoon, but is available
23 tomorrow morning.

24 MR. FEINSTEIN: I can do it tomorrow morning.
25 I've got a 9:30 court hearing just next door -- no,

1 downstairs, but I can be here at 10:00 or 10:30
2 tomorrow morning.

3 THE COURT: What about 9:00 tomorrow morning?
4 I don't know if others have -- how does that -- you
5 will be gone in any event, Ms. Riley?

6 MS. RILEY: I will be gone in any event. I
7 guess my point was if the Court wants additional
8 argument, I'd prefer it be set over till Monday.

9 THE COURT: I'll be gone Monday is part of
10 the problem. Or I'll be gone next week is part of the
11 problem. But if I'm writing, that's not a problem. I
12 mean, I would still be working on it.

13 Mr. Allred, does this afternoon or tomorrow
14 morning make any difference to you?

15 MR. ALLRED: Either of those dates are fine,
16 Your Honor.

17 MR. LEAVERTON: Same with me, Your Honor.

18 THE COURT: I think I would prefer to do it
19 first thing in the morning. Well, no, let's just do it
20 at 3:00. I'll let you know how I'm going to proceed.
21 Sorry to be so indecisive, but I think 3:00 would make
22 the most sense.

23 MR. LEAVERTON: Could I ask, Your Honor, the
24 trustee, like the voice of God, could maybe tell us on
25 the phone -- Mike and John, are you available this

1 afternoon?

2 UNIDENTIFIED SPEAKER: Yes.

3 MR. LEAVERTON: Okay.

4 THE COURT: All right. So 3:00 it is. And
5 we'll take a brief recess and then come back for what
6 was the 10:30 matter.

7 (This matter was adjourned until 3:00.)

8

9 * * * * *

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11 THE COURT: I've pondered this somewhat in
12 the interval. And I've reached the conclusion that I
13 really should do a written opinion. The issues are
14 quite complex, and I think that it helps me to sort out
15 how they fit together and what the result ought to be,
16 to go through the writing exercise. And so
17 accordingly, I'm going to endeavor to do that. But to
18 make sure that it gets done in a relatively timely
19 fashion, I'm going to set a further hearing, at which
20 time I'll give you a ruling if I haven't already done
21 it in writing.

22 What I would propose is the 29th of November,
23 which is a Thursday. The Thursday before is
24 Thanksgiving, I believe. And at 10:30. Does that time
25 present a problem for anyone that you know of? I take

1 it we don't know Ms. Riley's schedule.

2 Well, let's do this. If it does present a
3 problem, let chambers know and we'll sort something out
4 in that week. I've got hearings in Tacoma on Tuesday
5 for sure, and Friday I may not be able to use at all.
6 I may have to be out of town. So it could be later in
7 the day on Thursday, or it could be earlier in the week
8 probably. Or it could be into the following week. But
9 I know counsel and everybody wants a relatively prompt
10 response.

11 MR. LEAVERTON: Oh, I see. Thanksgiving is
12 the week earlier.

13 THE COURT: Right, yes. Otherwise I would be
14 shooting for that date.

15 MR. ALLRED: Your Honor, from my perspective,
16 that's fine.

17 THE COURT: All right. Thank you. Anything
18 else we need to do today?

19 MR. LEAVERTON: Nothing from the trustee,
20 Your Honor.

21 THE COURT: Okay. Oh, Mr. Allred, would you
22 submit an order that grants the motion to intervene?

23 MR. ALLRED: Yes, I will.

24 THE COURT: Okay. Thank you.

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CERTIFICATE

ROBYN OLESON FIEDLER certifies that:

The foregoing pages represent an accurate and complete transcript of the entire record of the digitally-recorded proceedings before the HONORABLE PHILIP H. BRANDT presiding, in the matter of THOW; and

These pages constitute the original or a true copy of the original transcript of the proceedings.

Signed and dated this 19th day of November, 2007.

AHEARN & ASSOCIATES

by |s| Robyn Oleson Fiedler
ROBYN OLESON FIEDLER, Notary
Public in and for the State of
Washington, residing at Buckley.